Nos. 87-1614, 87-1639, and 87-1668

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN W. MARTIN, *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

THE PERSONNEL BOARD OF JEFFERSON COUNTY, *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

RICHARD ARRINGTON, JR., *et al.*,
Petitioners,
v.
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On Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION, U.S. CONFERENCE OF MAYORS, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether persons affected by court-approved consent decrees, who were provided with actual notice and a meaningful opportunity to be heard prior to entry of the decrees, may challenge the legality of those decrees in a subsequent lawsuit.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a vital interest in the legal issues that affect the powers, responsibilities, and liabilities of state and local governments.

This case involves a collateral attack on race-conscious employment actions taken by the City of Birmingham, Alabama, pursuant to consent decrees entered in resolution of Title VII class action litigation.[1] Respondents—white employees who allege that they were injured by promotion decisions made pursuant to the decrees—had actual notice of the proposed consent decrees in the underlying Title VII lawsuits before the decrees were entered, but chose neither to intervene in those actions nor to present evidence at a fairness hearing conducted by the district court. The labor association representing most of the respondents, along with several similarly situated individual nonminority employees, did appear at the fairness hearing and unsuccessfully lodged objections to the proposed decrees on respondents' behalf. In this proceeding, respondents seek to relitigate the very objections rejected by the district court at the fairness hearing.

Should respondents' collateral attack on the consent decrees be permitted to proceed, state and local governments sued as employers under Title VII could not confidently negotiate and execute consent decrees containing race-conscious relief, even following actual notice and an opportunity to be heard by all interested parties. Every selection decision made pursuant to such a decree could subject the employer to claims from disappointed employees or applicants seeking to challenge the decree upon which the personnel action was based. Government personnel practices thus would remain in an unacceptable state of uncertainty, and scarce funds would be diverted

[1] Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to 2000e-17 (1982).

from other governmental needs to cover litigation costs as well as potential settlements and judgments. The inevitable effect would be to discourage public employers from entering into judicially approved settlements of Title VII litigation, thereby frustrating Congress's preference for voluntary compliance as a primary means to enforce Title VII. *See, e.g., Local No. 93, Firefighters v. City of Cleveland*, 106 S. Ct. 3063, 3072 (1986).

Permitting such collateral attacks on consent decrees also would undermine the goals served by according finality to judgments. State and local governments operating under Title VII consent decrees would be exposed to a multiplicity of actions, thereby wasting scarce governmental and judicial resources, impairing the delivery of public services, and potentially leading to inconsistent decisions and legal obligations. A rule prohibiting such attacks would instead channel all arguments for and against proposed consent decrees into a single legal forum, promoting the fair, efficient, and final adjustment of all competing interests before a consent decree is approved.

Because of the importance of the issues in this case to state and local governments, *amici* submit this brief in order to assist the Court in its resolution of the issues.[2]

STATEMENT[3]

A. *The litigation underlying the consent decrees.*

Petitioners—the City of Birmingham, Alabama ("the City"), the Personnel Board of Jefferson County, Alabama ("the Personnel Board"), and a number of minority individuals including John W. Martin ("the Martin Petitioners")—seek in this Court an order that will put

[2] The parties' letters of consent, pursuant to Rule 36 of the Rules of the Court, have been filed with the Clerk.

[3] *Amici* adopt by reference the Statements presented in the briefs of the City of Birmingham and petitioners John W. Martin, *et al.* The following summary sets forth only those matters that are, in our view, of greatest significance.

to rest nearly a decade and a half of complicated and fiercely contested litigation concerning the validity of the City's employment practices under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to 2000e-17 (1982) ("Title VII").[4] This litigation commenced with the filing of two actions alleging unlawful racial discrimination in employment by the City, the Personnel Board, and others, in the United States District Court for the Northern District of Alabama in 1974.[5] The United States filed a parallel action in 1975 alleging a pattern and practice of discrimination.[6] The cases were consolidated before Judge (now Chief Judge) Sam C. Pointer, Jr.

These three actions challenged the City's long history of racial discrimination in public employment. The district court held a trial in 1976 concerning only two of the many allegedly unlawful practices—the entry level examinations for firefighters and police officers.[7] The court held that the use of those examinations violated Title VII because they had an adverse impact on blacks and were not job related under *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). J.A. 553-87. The court ordered the Personnel Board to certify to the City, as eligible to be hired, specified ratios of blacks and whites. J.A. 588-89. The former Fifth Circuit affirmed,

[4] Although the reverse discrimination cases at issue here involve most of the City's departments, the cases in the Fire and Engineering Departments were tried first and are the subject of this case. Accordingly, this statement will focus on the facts pertinent to those two departments.

[5] *John W. Martin, et al. v. City of Birmingham, et al.*, Civil Action No. CA 74-Z-17-S, and *Ensley Branch, NAACP v. George Seibels, et al.*, Civil Action No. 74-Z-12-S.

[6] *United States v. Jefferson County, et al.*, Civil Action No. CA 75-P-0666-S.

[7] City employees such as respondents were very much aware of the litigation at that time. See, *e.g.*, J.A. 772-73 (testimony of the president of the firefighters' labor association, the Birmingham Firefighters Association).

and this Court denied *certiorari*. *See Ensley Branch, NAACP v. Seibels*, 13 Empl. Prac. Dec. (CCH) ¶ 11,504 (N.D. Ala. 1977), *aff'd in pertinent part*, 616 F.2d 812 (5th Cir.), *cert. denied*, 449 U.S. 1061 (1980).

B. *The consent decrees.*

A second trial, lasting eight trial days, was held in 1979 concerning certain other employment and promotional practices. Extensive additional evidence of discriminatory employment practices was adduced.

After the trial, but before the district court announced its decision, the parties entered into settlement negotiations. In 1981 the parties reached agreement on two proposed consent decrees—one among the plaintiffs, the United States, and the City (Pet. App. 122a-201a), and the other among the plaintiffs, the United States, and the Personnel Board (Pet. App. 202a-35a)—containing commitments to affirmative action goals and various procedures to implement those goals. The parties submitted these proposed decrees to the court for its consideration and approval.

Court-ordered notice inviting "*all persons who have an interest which may be affected by the Consent Decrees*" to submit written objections, if any, and to appear at a fairness hearing was published in two local newspapers and mailed directly to minority employees. Pet. App. 146a-47a (emphasis in original), 171a-92a, 222a-23a; J.A. 697-98.[8] Several objections were filed, claiming either that the relief was insufficient or that the relief was unlawful and excessive. The United States submitted a brief asserting that the race-conscious relief called for under the decrees satisfied and was consistent with Title VII. See J.A. 717-26.

Among the objectors were the Birmingham Firefighters Association and two of its nonminority members, Messrs. Gray and Sullivan (hereinafter collectively "the BFA ob-

[8] As discussed *infra*, respondents never have claimed that they did not have actual notice of the proposed decrees at this time.

jectors"). Each was represented by Mr. Fitzpatrick, who is also counsel for the respondents here. See J.A. 699-702; 703-13. Although respondents did not lend their names to the BFA's objections to the consent decrees, the BFA said at the time that "[i]t represents the interests of the majority of the presently-employed firefighters of the City of Birmingham" (J.A. 774), and it asked that the court consider the interests of nonminority employees even though they were not parties. See J.A. 704-05. At the fairness hearing, Mr. Fitzpatrick argued vigorously that the decrees' race-conscious relief violated both Title VII and the Fourteenth Amendment. See J.A. 731-40, R9-1255 to 67. The court offered him the opportunity to present evidence, but he declined. J.A. 732, R9-1266 to 67.

After "review[ing] with care the provisions of the proposed settlements to which objections have been raised, as well as those portions to which no objection has been raised" (Pet. App. 246a), the district court approved and entered the decrees. *United States v. Jefferson County*, 28 Fair Empl. Prac. Cas. (BNA) 1834, 1839 (N.D. Ala. 1981), *aff'd on other grounds*, 720 F.2d 1511 (11th Cir. 1983). Pet. App. 236a-49a.

After the fairness hearing, the BFA objectors sought to intervene (J.A. 772-76), but the court denied their motion as untimely. Pet. App. 246a.[9] The court of appeals affirmed, holding that the district court had not abused its discretion by denying leave to intervene at such a late date. *United States v. Jefferson County*, 720 F.2d

[9] At no time did respondents seek to intervene, either for purposes of appeal or otherwise. At the time that the BFA objectors sought intervention, it was not clear that a consent decree could be approved over the objection of one of the parties to the litigation, a question finally resolved by this Court in *Local No. 93, Firefighters v. City of Cleveland*, 106 S. Ct. 3063, 3079 (1986). The BFA objectors apparently sought to become full parties to the litigation to continue to press before the district court the very same objections that had been rejected at the fairness hearing, and, if possible, to interpose yet another barrier (withholding their consent) to entry of the decree.

1511, 1516-19 (11th Cir. 1983). J.A. 157-60. The BFA objectors did not file a petition for *certiorari*.

C. *The reverse discrimination litigation.*

In April 1982, consistent with the consent decrees, the City began for the first time in its history to promote black employees to supervisory positions in the Fire and Engineering Departments. J.A. 41; J.A. 439-45, R1-27. Competing white candidates challenged these proposed promotions, filing a series of reverse discrimination cases.[10] Ultimately, five reverse discrimination actions were filed. There are presently forty-one plaintiffs (some by intervention) in the five pending actions.

It was not until April 2, 1984—two years after the reverse discrimination litigation began—that all of the reverse discrimination cases were consolidated. J.A. 207. The Martin petitioners, plaintiffs in the underlying litigation that resulted in the decrees, intervened as defendants, over the objection of the reverse discrimination plaintiffs.[11] J.A. 46-47; 106-08; 169-71; 186.

Defendants unsuccessfully moved to dismiss each of the reverse discrimination cases as impermissible collateral attacks on the consent decrees. J.A. 223-24. The court held a five-day trial in December 1985 concerning only the promotions of blacks in the Fire and Engineer-

[10] The first of these actions was brought to challenge proposed promotions in the Fire Department. The plaintiffs, all of whom were members of the BFA, were represented by Mr. Fitzpatrick.

[11] The decrees provide that: *"the parties* hereto agree that they *shall* individually and jointly *defend the lawfulness* of such remedial measures *in the event of challenge* by any other party to this litigation or *by any other person or party who may seek to challenge such remedial measures through intervention or collateral attack."* Pet. App. 125a, 203a (emphasis added). Notwithstanding this commitment, the United States, which was a party to the decrees, intervened and realigned in the reverse discrimination actions as a plaintiff and challenged many of the promotions of blacks made pursuant to the decrees. J.A. 319-25.

ing Departments.[12] At the conclusion of the trial, the district court held that the reverse discrimination plaintiffs' claims were impermissible collateral attacks on the consent decrees. The court also held, in the alternative, that the remedial relief provided by the consent decrees was lawful, and that the promotions at issue constituted just such relief as was called for under the decrees. Pet. App. 61a-62a; 65a; 106a-07a; 109a. Plaintiffs timely appealed.

D. *The decision below.*

A divided panel of the Eleventh Circuit reversed the district court's dismissal of the private plaintiffs' claims. Pet. App. 3a-24a. The majority overturned the district court's ruling that the collateral attack on the consent decrees was impermissible, and remanded for trial of those claims.[13] The panel unanimously affirmed the dismissal of the claims of the United States, holding that the United States, as a party to the decrees, was estopped from challenging the City's actions in a collateral proceeding. Pet. App. 20a. Petitioners brought the case to this Court.

SUMMARY OF ARGUMENT

This case presents the question whether individuals who had actual notice of a proposed Title VII consent decree, and a meaningful opportunity to be heard prior to the decree's entry, may attack the legality of the decree in a subsequent lawsuit challenging individual personnel decisions. *Amici* submit that the important public interests in the voluntary resolution of employment discrimination claims and in the finality of judicial determinations require that such collateral attacks not be permitted.

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[12] The cases in the Police Department and the Streets and Sanitation Department were stayed pending the completion of the first trial. R12-127.

[13] Judge Anderson dissented in part, arguing that the consent decrees insulated the City from back pay liability, but were subject to collateral challenge seeking prospective injunctive relief.

Precluding relitigation of the legality of a Titie VII consent decree by interested individuals who have deliberately forgone a meaningful opportunity to enter the litigation and challenge the decree prior to its approval fairly and appropriately balances the rights of all concerned. This rule provides all interested individuals with an effective forum in which to raise their arguments and resolve conclusively the decree's legality. Such finality in turn will decrease the burdens of repetitive litigation over the same issues, thereby conserving judicial and governmental resources, avoiding inconsistent legal obligations, and encouraging the voluntary resolution of Title VII disputes.

This rule comports with both the constitutional requirements of due process and the prudential standard of collateral estoppel. Individuals will be precluded from relitigating the legality of the decree only if they had both effective notice and a meaningful opportunity to be heard. Such issue preclusion is fully consistent with this Court's holdings that an interested nonparty who deliberately bypasses the opportunity to participate in a lawsuit may be bound by its results. In addition, this rule is demonstrably preferable to requiring the mandatory joinder of all interested individuals prior to entry of a consent decree.

Respondents here had actual notice of the proposed consent decrees and the opportunity to challenge their legality prior to the court's approval. Yet they neither filed objections nor attempted to intervene. Moreover, although respondents failed to participate, the court carefully considered and rejected the very objections that they now seek to interpose by collateral attack. Under these circumstances, respondents fairly may be bound by the district court's determination that the relief provided under the decrees is lawful.

ARGUMENT

I. PERSONS WHO HAVE NOTICE OF A PROPOSED CONSENT DECREE IN A TITLE VII ACTION AND AN OPPORTUNITY TO INTERVENE AND BE HEARD BEFORE ENTRY OF THE DECREE MAY NOT ATTACK THE LAWFULNESS OF THE DECREE IN A COLLATERAL PROCEEDING.

In this case, the Court must decide whether nonminority employees, with actual notice of a proposed Title VII consent decree, deliberately may forgo the opportunity to challenge the proposed consent decree in the underlying litigation, and instead may wait and file separate individual actions to relitigate the validity of the decree. Resolution of this question requires the Court to consider several competing interests. Minority employees have a strong interest in prompt and effective redress for employment opportunities lost through a long history of employment discrimination. Nonminority employees who may be affected by race-conscious relief have an undoubted interest in ensuring that such relief is narrowly tailored and does not unnecessarily trammel their expectations. These competing private concerns in turn must be evaluated in light of the public's dual interest in facilitating the voluntary eradication of employment discrimination and in achieving a prompt and final resolution of discrimination claims, so that the City's mission of public service and protection will not be impeded by uncertainty and the costs and burdens of continued litigation.

We submit that these interests are appropriately balanced by a rule forbidding persons with actual notice of a pending decree, and a meaningful opportunity to enter the litigation and challenge that decree prior to its approval, from relitigating those challenges in subsequent lawsuits. Such a rule will require all interested parties to present their views to the court that is fully familiar with the issue and has before it all of the evidence relating to the decree, allowing all points of view to be considered and resolved in one proceeding. *Cf. Local 28, Sheet Metal Workers v. EEOC*, 106 S. Ct. 3019, 3050-54 (1986). The rule would not preclude employees or applicants from subsequently challenging particular personnel actions on the ground that they were not consistent with the decree, or from arguing—in the consent decree litigation—that the decree should be modified in light of changed law or facts. This balancing of interests would allow all parties an effective forum in which to have their points of view considered, while avoiding the constant relitigation of identical issues sought by respondents here and approved by the court below.

A. The Related Interests In Finality Of Judgments And Remedying Employment Discrimination Are Promoted By A Rule Prohibiting Collateral Attacks On Title VII Consent Decrees Entered Pursuant To Appropriate Safeguards.

Employers, minority employees, and the public generally share a strong interest in preserving the finality of court consent decrees in cases such as this. According finality to judgments conserves judicial resources, prevents costly and vexatious multiple lawsuits, and reduces the risk of inconsistent decisions and contradictory legal obligations. *See University of Tennessee v. Elliott*, 106 S. Ct. 3220, 3226 (1986) (the value of precluding parties from relitigating issues "encompasses both the parties' interest in avoiding the cost and vexation of repetitive litigation and the public's interest in conserving judicial resources"); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466 n.6 (1982) ("invocation of res judicata and collateral estoppel 'relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication'") (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)); *Montana v. United States*, 440 U.S. 147, 153-54 (1979) (to "preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple law-

suits, conserves judicial resources and fosters reliance on judicial action").

State and local governments and the citizens whom they serve have an especially significant interest in finality because of the need for uninterrupted delivery of basic services, such as police and fire protection. That vital interest would be seriously endangered if government employment practices remained in a state of uncertainty and flux because of repeated attacks on staffing decisions. Moreover, because a consent decree is a court order, violations are punishable by contempt. *See Local No. 93, Firefighters v. City of Cleveland*, 106 S. Ct. 3063, 3074 (1986). Allowing several different courts to determine the same question—whether the consent decree is lawful *vel non*—exposes a public employer to a significant risk of inconsistent or conflicting obligations, each punishable by contempt.[14] Each and every personnel action taken pursuant to a consent decree would form the occasion for continued relitigation, complete with the possibility of injunctive relief. The government's consequent inability to make timely decisions could well cause shortages of qualified personnel that would threaten public safety.

Similarly, there is a strong public interest in resolving employment discrimination actions through vehicles such as consent decrees. The Court has "on numerous occasions recognized that Congress intended for voluntary compliance to be the preferred means of achieving the objectives of Title VII." *Local No. 93*, 106 S. Ct. at 3072; *see also Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1457 (1987) ("we must be mindful of 'this Court's and Congress' consistent emphasis on "the value of voluntary efforts to further the objective of [Title VII]"'")

[14] This is a far different situation than considered by the Court in *W.R. Grace & Co. v. Local 759, Rubber Workers*, 461 U.S. 757 (1983), in which the employer deliberately had entered into separate agreements with conflicting obligations. Here, the risk of conflicts arises not from two contradictory commitments, voluntarily undertaken, but from repeated judicial interpretation of the same exact commitment undertaken only after approval by order of a court.

(quoting *Wygant v. Jackson Board of Education*, 106 S. Ct. 1842, 1855 (1986)); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (Title VII was enacted "to assure equality of employment opportunities . . . . Cooperation and voluntary compliance were selected as the preferred means for achieving this goal.").[15]

Consent decrees stem from the parties' voluntary agreement to resolve their differences. *Local No. 93*, 106 S. Ct. at 3076 ("it is the parties' agreement that serves as the source of the court's authority"). Title VII plaintiffs who agree to a consent decree do so as a compromise, relinquishing their opportunity for a broader remedy in order to ensure certain and immediate relief. See Schwarzschild, *supra* note 15, at 909; *see generally United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971). Permitting nonminority employees to bring collateral suits attacking the validity of the decree each time a minority employee is hired or promoted would destroy the remedy for which Title VII plaintiffs had bargained in good faith. Employers likewise would lose the valued repose for which they had bargained away substantial elements of their managerial discretion. Finality thus is essential to safeguarding the integrity of the settlement process.[16]

[15] Commentators have recognized that voluntary compliance with Title VII is the most effective means of attaining the statute's goal of eradicating discrimination:

> A remedy designed to reform the workings of a large organization is most effective when the organization cooperates in carrying out the remedy, and the human beings who make up an institution are more apt to cooperate in carrying out a negotiated scheme than in complying with an order imposed from above by a court.

Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 Duke L.J. 887, 899.

[16] There is a clear and determinative distinction between a voluntary affirmative action plan and a consent decree for these purposes. Unlike a voluntary affirmative action plan, a consent decree may be entered only after consideration and approval by the court. Under

Permitting collateral attacks on consent decrees would burden the courts with disputes that could delay indefinitely the final resolution of important civil rights claims. There is an almost limitless supply of possible plaintiffs who might bring subsequent collateral attacks. Indeed, the very nature of race-conscious relief—which this Court has repeatedly held permissible as a remedial measure in appropriate circumstances—ensures that at least one person may wish to object to any personnel decision made pursuant to a decree.[17] Allowing collateral challenges to the legality of Title VII consent decrees thus could subject parties and the courts to endless reliti-

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the rule that we propose, such a decree would have binding effect on nonparties only if preceded by effective notice and a meaningful opportunity to be heard and to intervene in the underlying litigation. Unlike affirmative action plans, which are purely private agreements whose legality has never been determined, and which therefore must be subject to judicial scrutiny in a reverse discrimination case, a consent decree surrounded by procedural safeguards should be exempt from challenges to its basic legality. We recognize that consent decrees are premised initially upon the parties' agreement. Nonetheless, a decree that is rendered following actual notice and a fairness hearing in open court certainly is more than a private contract. The court's continuing power to supervise and modify the decree, and the court's clear duty to consider and resolve all legal challenges to the decree prior to its approval, plainly distinguish a consent decree from a private agreement. We suggest that any concerns the Court may have about the level of judicial scrutiny and supervision of consent decrees be addressed not by denying those decrees the finality that they deserve, but by ensuring that all interested parties raise all objections in one proceeding, before a court that recognizes its responsibility to afford all parties a complete and sensitive hearing prior to the decree's approval.

[17] This suit illustrates that this concern is not illusory. Nearly every selection of a minority for promotion by the City has resulted in a charge of discrimination by disappointed white candidates. Five suits and forty-one plaintiffs/intervenors have resulted to date, and more can be expected in the future if the decrees are not afforded finality. The City's scarce resources are being consumed by legal defense expenditures, preventing their allocation toward resolving the countless other problems presently facing municipalities.

gation, leading to the waste of precious judicial and governmental resources.[18]

Such collateral attacks on a consent decree undermine the authority and finality of judgments rendered throughout our judicial system. The " 'proper exercise of restraint in the name of comity keeps to a minimum the conflicts between courts administering the same law, conserves judicial time and expense, and has a salutary effect upon the prompt and efficient administration of justice.' " *Bergh v. State of Washington*, 535 F.2d 505, 507 (9th Cir.) (Kennedy, J.) (affirming denial of injunction that would prohibit federal district court judge from ordering State of Washington to promulgate regulations in favor of Native American fishermen) (quoting *Brittingham v. Commissioner*, 451 F.2d 315, 318 (5th Cir. 1971)), *cert. denied*, 429 U.S. 921 (1976). Without such restraint, "courts could never enter a judgment in a lawsuit with the assurance that the judgment was a final and conclusive determination of the underlying dispute." *O'Burn v. Shapp*, 70 F.R.D. 549, 552 (E.D. Pa.), *aff'd without opinion*, 546 F.2d 417 (3d Cir. 1976), *cert. denied*, 430 U.S. 968 (1977).

The rule that we propose is designed to foster these related interests, while preserving the rights of nonminorities to litigate their claims in a fair and efficient manner before the court most familiar with the case. Precluding relitigation of a decree's validity by those

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[18] *See Thaggard v. City of Jackson*, 687 F.2d 66, 69 (5th Cir. 1982) ("To permit [plaintiffs'] collateral challenge of the decrees 'would clearly violate the policy under Title VII to promote settlement.' ") (quoting *Prate v. Freedman*, 430 F. Supp. 1373, 1375 (W.D.N.Y.), *aff'd without opinion*, 573 F.2d 1294 (2d Cir. 1977), *cert. denied*, 436 U.S. 922 (1978)), *cert. denied*, 464 U.S. 900 (1983); *Hefner v. New Orleans Pub. Serv., Inc.*, 605 F.2d 893, 898 (5th Cir. 1979) (The consent decree "was reached after careful consideration by the parties involved; they do not wish, and should not be forced, to defend the decree in lawsuits brought long after the decree was signed. Allowing suits like this would severely undercut the strong policy in favor of reaching voluntary settlements . . . ."), *cert. denied*, 445 U.S. 955 (1980).

provided with actual notice and an opportunity to intervene and be heard prior to the decree's approval appropriately balances the rights of all concerned.

B. This Rule Is Consistent With Due Process Guarantees And With Principles Of Collateral Estoppel.

1. *Due process requires only that affected individuals receive adequate notice of the proposed consent decree and an opportunity to be heard.*

Contrary to the intimations of the Eleventh Circuit, prohibiting collateral attacks on consent decrees by individuals with actual notice and an opportunity to be heard before entry of the decree is fully consistent with the due process guarantees of the Fifth and Fourteenth Amendments. Due process requires that individuals whose interests will be affected by a court's decision be provided with effective notice and a meaningful opportunity to be heard. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (the "elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (the "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'") (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

Due process, however, does *not* require that all interested individuals be made parties to the action. Indeed, binding individuals to judgments to which they were not parties is a long-accepted aspect of such litigation as bankruptcy, and has been held not violative of due process. *See, e.g., In re Gregory*, 705 F.2d 1118, 1122-23 (9th Cir. 1983) (affirming dismissal of action collaterally attacking bankruptcy plan; discharge of debt to nonparty creditor permissible under due process because constructive notice given); *In re GAC Corp.*, 681 F.2d 1295, 1300-01 (11th Cir. 1982) (interests of nonparty debenture holders may be extinguished through constructive notice).

2. *Prohibiting collateral attack is consistent with the prudential standard of collateral estoppel.*

The prudential standards of res judicata and collateral estoppel are judicially created doctrines designed to prevent the relitigation of issues previously decided by a court of competent jurisdiction. *See, e.g., Kremer*, 456 U.S. at 468 n.6 ("invocation of res judicata and collateral estoppel 'relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication'") (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)). As such, these principles have been reshaped as legal developments have justified modifications of the rules governing issue and claim preclusion. *See, e.g., Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 320-30, 349-50 (1971) (discussion of evolution of preclusion rules and holding modifying rule of mutuality of collateral estoppel); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329-33 (1979) (permitting application of offensive nonmutual collateral estoppel at discretion of trial court).

Historically, courts permitted claim and issue preclusion only against parties to the original litigation or their privies; accordingly, even individuals with actual notice who did not intervene in a lawsuit were not bound by judgments rendered therein. *See Gratiot County State Bank v. Johnson*, 249 U.S. 246, 249-50 (1919) ("Unless he exercises the right to become a party, he remains a stranger to the litigation and, as such, unaffected by the decision of even essential subsidiary issues.").

More recent decisions by this Court, however, have recognized that strict application of these historical principles is neither mandatory nor justifiable where one intentionally has abstained from intervening in an action

in which his interests were being considered. In the *Penn-Central Merger & N & W Inclusion Cases*, 389 U.S. 486 (1968), the Borough of Moosic objected to the proposed Penn-Central railroad merger that had been approved by the Interstate Commerce Commission. Moosic filed suit in federal district court in Pennsylvania seeking an injunction. Other similar actions were filed in various district courts throughout the country. These other lawsuits, including the Pennsylvania action, were stayed pending resolution of numerous common issues by a three-judge panel in the Southern District of New York. After the Southern District approved the merger, this Court affirmed pertinent aspects of the judgment.

The *Penn-Central* Court further held that although the Borough of Moosic was not a party to the New York litigation, it was nevertheless bound by the decision approving the merger.

> [T]he Borough of Moosic had an adequate opportunity to join in the litigation in that court following the stay of proceedings in the Middle District of Pennsylvania. . . . *All parties with standing to challenge the Commission's action might have joined in the New York proceedings. In these circumstances, it necessarily follows that the decision of the New York court* which, with certain exceptions, we have affirmed, *precludes further judicial review or adjudication of the issues upon which it passes.* . . . [I]t is therefore no longer open to the parties to challenge the Commission's approval of the Penn-Central merger . . . .

389 U.S. at 505-06 (emphasis added).[19] This holding recognized implicitly the inequity in permitting an

[19] The Court went on to note that "claims for specific relief, such as particularized objections which may arise from specific proposals for consolidation or reduction of facilities or services, are unaffected by the decision in the present cases." 389 U.S. at 506. In the context of objections to affirmative action consent decrees, such "particularized objections" may be considered "as applied" challenges, questioning the propriety of the action under the decree rather than the decree's validity. Such challenges would not be precluded under our theory, and would be heard in the consent decree litigation.

avowedly interested person to sit on the sidelines and later bring a collateral attack on the decision.

In a similar context, this Court indicated that notice and an opportunity to intervene constitute an adequate basis upon which to bind a nonparty. In *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 107 (1968), the Court considered and rejected an assertion that a necessary party that is not joined in the suit has a "substantive right" to have the litigation dismissed. The Court stated that such a party "should be bound by the previous decision because, although technically a nonparty, he had purposely bypassed an adequate opportunity to intervene." *Id.* at 114.

The lower courts have relied on these decisions to prohibit collateral attacks on consent decrees by persons who intentionally have refrained from exercising the opportunity to participate in the underlying lawsuit.[20] For ex-

[20] It is this rationale, sometimes unstated, that underlies the numerous court of appeals decisions refusing to permit collateral attacks on Title VII consent decrees. *See Striff v. Mason*, 849 F.2d 240, 245 (6th Cir. 1988) ("It is well settled that legal actions which constitute collateral attacks on consent decrees entered in civil rights cases are not permitted."); *Marino v. Ortiz*, 806 F.2d 1144, 1146 (2d Cir. 1986) ("It is well settled that collateral attacks on consent decrees entered in Title VII actions are not permitted."), *aff'd by equally divided Court*, 108 S. Ct. 586 (1988); *Thaggard v. City of Jackson*, 687 F.2d 66, 68 (5th Cir. 1982) (collateral attacks on consent decrees "impermissible"), *cert. denied*, 464 U.S. 900 (1983); *Stotts v. Memphis Fire Dep't*, 679 F.2d 541, 558 (6th Cir. 1982) ("reverse discrimination challenges to reasonable consent decrees are impermissible collateral attacks"), *rev'd on other grounds sub nom. Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Goins v. Bethlehem Steel Corp.*, 657 F.2d 62, 64 (4th Cir. 1981) ("basic considerations of comity bar" collateral attacks on consent decrees), *cert. denied*, 455 U.S. 940 (1982); *Dennison v. City of Los Angeles Dep't of Water & Power*, 658 F.2d 694, 696 (9th Cir. 1981) (reverse discrimination suit by union barred as "impermissible collateral attack"); *Culbreath v. Dukakis*, 630 F.2d 15, 22 (1st Cir. 1980) ("Collateral attack on the decree will

ample, in *National Wildlife Fed'n v. Gorsuch*, 744 F.2d 963, 968-69 (3d Cir. 1984), the court held that the National Wildlife Federation could not collaterally attack a consent decree where it had been denied intervention, but "deliberately chose not to appeal" that decision.

> Clearly, plaintiffs were not outsiders unaware of litigation in progress that would ultimately affect their interests. In a deliberate choice of litigation strategy, they chose to stand on the sidelines, wary but not active, deeply interested, but of their own volition not participants. Although plaintiffs may not have had their day in court as litigants, they had the opportunity and for reasons of their own adopted a different approach. Plaintiffs cannot, at this stage, assert persuasively that the interest of finality should not prevail.

Id. at 971-72.[21]

The consistent theme underlying these decisions is fairness. It is unfair for persons who have actual notice of an action in which they have an interest simply to sit on the sidelines and await the outcome of the action before filing their own suit. Nonminority employees who are aware that a proposed consent decree may adversely

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be impossible because only the district court supervising implementation of the decree will have subject matter jurisdiction to modify the decree."); *cf. Black & White Children of Pontiac School System v. School District*, 464 F.2d 1030, 1031 (6th Cir. 1972) (per curiam) (affirming district court's ruling that plaintiffs may not collaterally attack school desegregation order).

[21] *See also Safir v. Dole*, 718 F.2d 475, 483 (D.C. Cir. 1983) ("It thus appears that [appellants] had full opportunity to argue the issue . . . . This is enough in law and reason to work a collateral estoppel."), *cert. denied*, 467 U.S. 1206 (1984); *Society Hill Civic Ass'n v. Harris*, 632 F.2d 1045, 1052 (3d Cir. 1980) ("an unjustified or unreasonable failure to intervene can serve to bar a later collateral attack"); *Adams v. Bell*, 711 F.2d 161, 169-70 (D.C. Cir. 1983) (en banc) (Appellants "had ample opportunity to assert their rights through the normal routes of judicial review. . . . These interests could have been fully protected by intervention in a pending lawsuit which provided an appropriate forum . . . ."), *cert. denied*, 465 U.S. 1021 (1984).

affect their interests cannot sit back, allow the settlement to be approved, and then file suit against the employer simply for complying with the decree.

C. The Application Of Appropriate Notice Procedures And Liberal Intervention Under Fed. R. Civ. P. 24 Satisfy The Requirements Of Due Process And Issue Preclusion Against Interested Persons Seeking To Challenge Collaterally The Legality Of A Title VII Consent Decree.

Collateral attacks on Title VII consent decrees should be prohibited so long as the persons to be precluded were afforded: (1) notice of the proposed consent decree and (2) a meaningful opportunity to be heard and to intervene after the notice was given. In resolving this case, we do not suggest that this Court must or should precisely delineate what notice is appropriate in order to give a consent decree binding effect. This Court has adhered consistently to a flexible concept of notice, depending upon the context in which the notice is provided. In the context of most Title VII litigation, notice of a proposed consent decree that is provided directly to present employees and also published in local newspapers of general circulation not only meets the *Mullane* standard of constitutional adequacy, but also provides a rational and adequate basis for the application of collateral estoppel. This is particularly true where the litigation has been the subject of extensive media coverage, as in the underlying litigation here.

At a minimum, the notice of a proposed consent decree must be reasonably calculated to inform all interested persons of the proceedings and of the manner in which they may appear at a hearing in order to protect their interests. Actual notification by mail or payroll notice,[22]

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[22] *Cf. Tulsa Professional Collection Servs., Inc. v. Pope*, 108 S. Ct. 1340, 1348 (1988); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983). In this case, respondents have raised no claim that they did not have actual notice.

or constructive notification by workplace posting,[23] or by newspaper, radio, or television publication is typically utilized by parties seeking to apprise interested persons of the pendency of a proposed consent decree. Depending on the circumstances, some or all of these methods may be necessary to bind nonparties to a decree.

In addition to effective notice, nonparties must be provided a meaningful opportunity to be heard prior to entry of the decree. Typically, the requirements imposed by district courts on those seeking to be heard at a fairness hearing are minimal, and therefore comport quite readily with the "opportunity to be heard" requirement of due process. Reasonable restrictions, such as requiring advance notification to the court and the parties of one's objections, do not render an opportunity to be heard meaningless. *See, e.g., Mathews*, 424 U.S. at 333 (the "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'") (quoting *Armstrong v. Manzo*, 380 U.S. at 552); *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 325 (10th Cir. 1984) ("Although the right to be heard is an integral part of due process, an individual entitled to such process is not entitled to dictate to the court the precise manner in which he is to be heard.").[24]

Persons to be bound finally must be afforded a meaningful opportunity to intervene and be heard after the notice is given. Rule 24 of the Federal Rules of Civil

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[23] *Cf. Keitz v. Lever Bros. Co.*, 563 F. Supp. 230 (N.D. Ind. 1983) (workplace posting provides sufficient notice to preclude tolling of statutory limitations period for bringing age discrimination action); 29 C.F.R. § 1903.14(a)(C)(2) (1986) (OSHA regulation requiring objections within 10 days after workplace posting); 30 U.S.C. § 811 (1982) (Mine Safety and Health Act challenges tied to workplace posting).

[24] It goes without saying, of course, that it is the opportunity to be heard, rather than exercise of the opportunity, that is determinative. *See, e.g., Kremer*, 456 U.S. at 485 (the "fact that Mr. Kremer failed to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy").

Procedure sets forth the standards for intervention, including timeliness of the request for intervention. "The timeliness requirement is flexible and the decision is one entrusted to the district judge's sound discretion." *United States v. Yonkers Board of Education*, 801 F.2d 594, 594-95 (2d Cir. 1986); *see also NAACP v. New York*, 413 U.S. 345, 366 (1973) (Timeliness "is to be determined by the [district] court in the exercise of its sound discretion."). As this Court has indicated, the district court should not consider merely the length of time that the proceeding has been pending, but should base its determination upon all of the circumstances of the case, including possible prejudice to the would-be intervenor. *NAACP*, 413 U.S. at 365-66. A careful but liberal application of these criteria generally will permit intervention before a consent decree is approved, thereby affording potentially affected nonminority employees an adequate opportunity to challenge the legality of the decree.[25]

D. This Rule Is Demonstrably Preferable To The Alternatives.

Precluding collateral attacks by nonparties upon consent decrees entered pursuant to adequate procedural safeguards is demonstrably preferable to the only sug-

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[25] Although in some instances courts have denied motions to intervene made at the time that a consent decree is proposed (*see Culbreath v. Dukakis*, 630 F.2d 15, 22 (1st Cir. 1980); see also Schwarzschild, *supra* note 15, at 920-22 (and cases cited therein)), in most instances intervention sought prior to judicial consideration of objections to a decree will not be intolerably disruptive. A requirement that a motion to intervene be made timely upon learning that one's interests may be affected is fair to all concerned. *See Yonkers Bd. of Educ.*, 801 F.2d at 597 (any interest that the intervenor had in the action "began to gestate when it became generally known that [particular] sites [for multi-family housing] had been proposed early in the remedy proceedings"); *Corley v. Jackson Police Dep't*, 755 F.2d 1207, 1210 (5th Cir. 1985) (would-be intervenors "had control of the tactical decisions which occasioned or contributed to the inordinate delay"). The district court's decision to deny intervention to the BFA objectors is not before the Court in this case. *See United States v. Jefferson County*, 720 F.2d 1511, 1519 (11th Cir. 1983).

gested alternatives. For example, the United States, in a previous case,[26] has argued that mandatory joinder under Rule 19 of the Federal Rules of Civil Procedure should be required. Yet compulsory joinder is wholly unworkable, and would negate the effectiveness of consent decrees every bit as completely as allowing collateral attack.[27]

We submit that it is fair, constitutional, and eminently sensible to require an interested individual with notice of a proposed consent decree either to intervene and litigate its lawfulness in the underlying action, or else to waive any arguments that he may have that the decree's terms are illegal. This rule places the burden of becoming a party directly on those individuals who feel strongly enough about the issues to come forward and join in the fray. The number of parties to the action thus would correspond to those who really care about the issues. At the same time, however, the original parties will have a strong incentive to provide the most effective notice possible and to ensure that all interested individuals come forward and be heard, so that collateral challenges to the decree will be precluded.

By contrast, mandatory joinder of all "interested parties" pursuant to Fed. R. Civ. P. 19 unreasonably places the burden for bringing individuals into the court on the original parties, who have no reason to know

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[26] See Brief for the United States as *amicus curiae* in *Marino v. Ortiz*, 108 S. Ct. 586 (1988) (No. 86-1415).

[27] Requiring compulsory joinder on the grounds that nonminority employees are necessary parties for purposes of relief under a consent decree raises extraordinarily serious questions. Neither this Court's jurisprudence nor the language of the Federal Rules of Civil Procedure supports the proposition that a party may be "necessary" for relief purposes but not "necessary" for purposes of the underlying adjudication. Requiring compulsory joinder for consent decrees thus raises the specter of defendant classes, in which joinder of every party that could conceivably be affected by a case would be required at the outset of litigation. Such a procedure would make it all but impossible to conduct litigation that involves the interests of more than a few parties.

which members of this potentially enormous group are sufficiently interested to justify making them parties. Moreover, once made a party under Rule 19, each potentially interested individual will be required to file an appearance, retain counsel, and expend attorneys' fees, in a case in which his or her interest may be minimal. We submit that the choice of entry should be left to the individual, and that nothing in either the Federal Rules or this Court's jurisprudence requires mandatory joinder of all parties who conceivably might wish to litigate the validity of a consent decree.

Furthermore, the number of interested persons may be so large as to make simply irrational the attempt to join every one of them. In a nationwide Title VII class action, for example, the interested nonparties could well number in the tens of thousands, spread throughout locations all across the country, or the world. Joining each of them under Rule 19 would be exceedingly awkward, if not impossible because of jurisdiction and venue difficulties. Moreover, joinder of so many individuals would destroy the very manageability of large and complex actions that Fed. R. Civ. P. 23 was specifically designed to create. *See, e.g., Simer v. Rios*, 661 F.2d 655, 668 n.24 (7th Cir. 1981) ("the purpose of Rule 23 is to allow an efficient mechanism for disposing of multiple claims"), *cert. denied*, 456 U.S. 917 (1982).

Compulsory joinder might be appropriate if approval of a consent decree imposed substantive obligations upon nonminorities, or completely precluded them from any voice in their treatment. But as this Court made clear in *Local No. 93*, a consent decree embodying racial preferences "imposes no legal duties or obligations upon [nonminority employees or their representatives] at all; only the parties to the decree can be held in contempt of court for failure to comply with its terms." *Id.* at 3080. Moreover, many decrees will not impose significant detriments upon nonminority employees. In this case, for example, the decrees in question had the effect of (at most) postponing promotions for nonminority employees, rather

than frustrating "legitimate firmly rooted expectations." *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1455 (1987) (O'Connor, J., concurring in part and dissenting in part).

Such inchoate interests of nonminority employees—subject to alteration for any number of reasons, including reductions in force, changes in employer operations, or voluntary departure by the employee—are more than adequately protected by the rule that we propose. In addition to the opportunity to challenge the decree's legality at the outset, as discussed above, adversely affected employees may later raise "as applied" challenges, before the original trial court, claiming that the action is not permitted or mandated by the decree. *Cf. Penn-Central Merger*, 389 U.S. at 506.

Moreover, a consent decree remains subject to modification, even over the objection of a signatory, to take into account changes in law or facts. *See, e.g., Railway Employees v. Wright*, 364 U.S. 642 (1961); *United States v. Swift & Co.*, 286 U.S. 106 (1932). The court's continuing jurisdiction over the decree thus affords a powerful protection to nonminorities whose interests are affected by it in later years.

In sum, these avenues of challenge offer ample protection for the interests of nonminorities. Those interests simply do not require continued and unending relitigation of the same basic objections to the underlying legality of a consent decree, nor do they justify compulsory joinder prior to approval of a decree. A rule forbidding collateral attacks by parties with actual notice and an opportunity to intervene and be heard is the only appropriate balance of the various interests involved.

II. RESPONDENTS MAY NOT ATTACK THE LAWFULNESS OF THE DECREES BECAUSE THEY HAD ADEQUATE NOTICE AND AN OPPORTUNITY TO INTERVENE AND BE HEARD REGARDING THE FAIRNESS OF THE PROPOSED DECREES.

Respondents in this action should be precluded from bringing a collateral attack on the decrees' legality. They received adequate notice and had a meaningful opportunity to intervene and be heard regarding the fairness and lawfulness of the proposed decrees. This procedure satisfied the requirements of due process, and justifies the application of collateral estoppel to the entering court's decision approving the fairness and lawfulness of the decrees.

A. Respondents Received Adequate Notice Of The Proposed Consent Decrees And Fairness Hearing.

Each of the respondents already was employed by the City at the time that notice was distributed regarding the proposed decrees. Thus, all lived in or about the City, worked in the City, and can be expected to have appreciated the importance to their own interests of the underlying litigation seeking to open their departments to the more equitable hiring and promotion of blacks.

Notice of the proposed consent decree was published in Birmingham's most widely read general circulation newspaper and the local minority newspaper, inviting "*all persons who have an interest which may be affected by the Consent Decrees*" (Pet. App. 173a) to file any objections and appear at the fairness hearing. Pet. App. 146a-47a, 171a-92a, 222a-23a; J.A. 695 (emphasis in original). Individual notice was sent to all minority employees. J.A. 695. In addition, there was substantial media publicity regarding the proposed consent decrees and the objection/fairness hearing process.

Numerous individuals similarly situated to respondents learned of the proposed settlement. In response to the notice, the BFA and two of its nonminority members filed objections and appeared at the fairness hearing, repre-

sented by respondents' counsel. Most notably, none of the respondents has ever claimed during this long litigation that he did not have actual notice of the proposed consent decrees and the objection/fairness hearing process.[28]

B. Respondents Themselves Sought Neither To Intervene Nor To File Objections To The Proposed Consent Decrees.

Notwithstanding this notice and their knowledge of the proceedings, none of the respondents themselves ever filed objections to the proposed decrees or sought to intervene in the underlying litigation. Instead, they stood idly by, content to allow others to champion their interests,[29] and to await entry of the decrees, and then to attack collaterally the judgment if they were ever individually adversely affected by promotion of a black candidate. This is just the type of sandbagging that this Court refused to permit in the *Penn-Central Merger* case. *See* 389 U.S. at 505-06.[30] Having had notice, and having disdained the opportunity to intervene and be heard, respondents should

[28] This case does not require the Court to address the requisite extensiveness of notice because respondents here have not contested the repeated assertion that they had actual notice. Actual notice to nonparty employees will always suffice for purposes of due process. *See National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315 (1964) ("Since the respondents did in fact receive complete and timely notice of the lawsuit pending against them, no due process claim has been made. The case before us is therefore quite different from cases where there was no actual notice.").

[29] This tactic discloses yet another inadequacy of permitting collateral attacks on consent decrees. An organization such as the BFA can coordinate a multi-wave assault on the consent decree, sending some members in to challenge the decree in the underlying litigation, but holding back others for collateral attacks at a later date.

[30] *See also National Wildlife Fed'n v. Gorsuch*, 744 F.2d 963, 971-72 (3d Cir. 1984); *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 459 F. Supp. 507, 514 (S.D. Fla. 1978) ("In order to give effect to the principles of finality embodied in the doctrine of *res judicata*, courts may invoke equitable preclusion where a nonparty has been aware of the initial litigation and failed to intervene to protect its interests."), *aff'd*, 621 F.2d 1340 (5th Cir. 1980), *rev'd in part on other grounds*, 458 U.S. 670 (1982).

not now be permitted to challenge collaterally the validity of the decrees.

C. The Trial Court Received And Fully Considered Objections To The Proposed Decrees' Validity That Were Lodged On Behalf Of Respondents.

Even though respondents failed to become personally involved in the underlying litigation, their interests were adequately represented before and considered by the trial court that approved the decrees. The BFA and Messrs. Gray and Sullivan filed timely written objections to the decrees. Respondents' attorney, Mr. Fitzpatrick, represented these BFA objectors, and appeared at the fairness hearing. Seven other nonminority individuals filed a brief and appeared at the hearing. See J.A. 714.

Each of these objectors was given a full and fair opportunity to present and argue his objections and introduce evidence at the fairness hearing. See J.A. 727-30.[31] The BFA objectors voiced the very same objections upon which respondents have based their collateral challenges to the decrees.[32]

After carefully considering all of these objections, and "review[ing] with care the provisions of the proposed settlements to which objections have been raised, as well as those portions to which no objection has been raised," the court approved and entered the proposed decrees, expressly holding that the decrees "are fair, reasonable, adequate and lawful." Pet. App. 246a; see Pet. App. 236a-49a. This process provided respondents a full, fair, and meaningful opportunity to litigate the lawfulness of

[31] That Mr. Fitzpatrick elected not to introduce evidence does not taint the hearing, for it is the *opportunity to be heard* which is paramount to the conclusiveness of the judgment. *See Kremer*, 456 U.S. at 485; *see also Penn-Central Merger*, 389 U.S. at 505-06 (precluding nonparty from litigation based on "adequate opportunity to join in the litigation," despite failure to do so).

[32] Indeed, the BFA objectors asked the court to consider the interests of nonminority City employees even though they were not parties. See J.A. 704.

the decrees. Imposition of collateral estoppel is justified both because of respondents' failure to participate personally in the process to protect their own interests, and the court's careful consideration of respondents' interests through the arguments raised by their champions, the BFA objectors.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed insofar as it remanded the case for trial.

Respectfully submitted,

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